U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 March 2003

CASE NO.: 2002-LHC-1432

OWCP NO.: 07-154060

IN THE MATTER OF

ROY L. BINGHAM,
Claimant

v.

AVONDALE INDUSTRIES, INC.,
Employer

APPEARANCES:

DOUGLAS M. MORAGAS, ESQ.
On behalf of the Claimant

WILLIAM C. CRUSE, ESQ.
On behalf of the Employer

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Roy Bingham (Claimant) against Avondale Industries (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Metairie, Louisiana, on November 20, 2002. All parties were afforded a full

opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Joint Exhibit 1;
2. Claimant's Exhibits 1-6; and
3. Employer's Exhibits 1-19.

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

I. STIPULATIONS

During the course of the hearing the parties stipulated and I find as related to Case No. 2002-LHC-01432 (JE-1):

1. Jurisdiction is not a contested issue. The claimant, a welder, was injured while engaged in new construction of a vessel, which was in the Mississippi River.

2. Date of injury/accident: March 31, 1999.

3. Injury in course and scope of employment: Yes.

4. Employer/employee relationship at time of accident: Yes.

5. Date Employer advised of injury: March 31, 1999.

6. Date Notice of Controversion filed: January 17, 2000.

7. Date of informal conference: September 28, 2000 and February 21, 2002.

8. Average weekly wage at time of injury: $532.85.

9. Permanent disability: 7% of right lower extremity.

10. Date of maximum medical improvement: December 20, 2001.

II. ISSUES

The unresolved issues in this proceeding are:

1. Entitlement to compensation for temporary total and temporary partial disability from December 29, 1999, through August 22, 2001, and the amount of such entitlement.

2. Whether the claimant is entitled to permanent and total disability compensation from December 21, 2001, and continuing until alternative employment has been proved.

3. Entitlement to reimbursement of bills of Dr. George Murphy.

III. STATEMENT OF THE CASE

Claimant's Testimony

Claimant is a forty-six year old high school graduate who is a welder by trade. Claimant worked as a welder for Employer for about thirteen years before the accident in question, and prior to that time, he had five years of previous welding experience. (Tr. 10).

On March 31, 1999, Claimant had a workplace accident shortly after arriving at work. He was walking down a flight of stairs, and when he reached the bottom, he attempted to step over the two-foot opening in the door. At that point, Claimant's leg missed the opening and hit the door, and he was unable to continue walking. Claimant testified that other employees kept walking past him and asking if he was alright. (Tr. 11). When Claimant's foreman arrived, he sent Claimant to First Aid, where he was examined and sent home by a doctor. (Tr. 12).

At some point, Claimant returned to work, but he did not recall how long he was at home, nor did he recall whether he returned to full duty or limited duty. (Tr. 13). In addition, Claimant did not recall how long he continued to work once he returned, although at some point, he did have to stop working. (Tr. 13-14). He agreed it was possible that he worked for about five months, from March 1999 until August 10, 1999. (Tr. 14). On cross-examination, Claimant agreed that he might have been offered a restricted duty position during that time, but he testified that he was in fact required to climb a ladder as part of his job, despite the restrictions. (Tr. 45-46). Claimant did not recall whether he was offered a restricted position in July 1999 that involved no squatting, kneeling on the right knee or climbing and decreased walking and standing. (Tr. 46-47). He then denied that he was offered that position. (Tr. 47). Claimant affirmed that he was offered a job which only

required him to sit on a bucket and weld, but he testified that he could not do the job because his knee hurt too much after he had to climb up a ladder to set his machine. (Tr. 47-48). He agreed that he could have done the welding job if someone else had set his machine for him. (Tr. 49).

Claimant eventually began treating with Dr. Ralph Katz, an orthopedist. (Tr. 15). Claimant testified that he thought Dr. Katz released him to return to work before December 1999. (Tr. 15-16). Claimant stated that Dr. Katz told him to watch what he was doing at work. Claimant was unable to continue working, so he returned to Dr. Katz, who treated him for a while and then told him to try to return to work again. (Tr. 16). Claimant told Dr. Katz that he was unable to return to full duty because he was unable to do the kneeling, squatting and climbing required by his welding job. (Tr. 18). Dr. Katz told him to just try to do it and he could stop if he needed to. (Tr. 18-19). Claimant did attempt to return to full duty, but he had to stop when his leg began hurting. Claimant did not know how long he actually worked before he starting having problems, but he was sent to First Aid after he advised his foreman that he was in pain. (Tr. 19). Claimant was sent home, and he did not recall whether he returned to Dr. Katz or returned to work after that point. (Tr. 20).

Claimant affirmed that although Dr. Katz told him he needed treatment for a meniscal tear, Dr. Katz also told him that his condition was unrelated to his workplace accident. (Tr. 17, 18). Dr. Katz never told Claimant how to pay for his surgery. (Tr. 17). Claimant testified that he sought the services of an attorney so that Employer would pay for his surgery. (Tr. 26).

In February or March 2000, Claimant began seeing Dr. George Murphy, who advised Claimant that he needed surgery and should do sedentary work in the meantime. (Tr. 20-21). Claimant affirmed that Dr. Murphy told him not to return to work as a welder until after his surgery. At that point, Claimant returned to Employer with his restrictions from Dr. Murphy, which included no squatting, no climbing and no kneeling. (Tr. 21). Claimant did not recall which foreman he presented with his restrictions. (Tr. 21-22). Claimant testified that he tried but was unable to do the work. (Tr. 21, 23). Claimant explained that it is impossible to be a welder with such restrictions, because there is a lot of kneeling, climbing and squatting involved in the job. (Tr. 22). Claimant stated that he thought there were some jobs that he could do at work, but Employer never offered any of these jobs to him. (Tr. 22-23). On cross-examination, Claimant testified that he came in and filled out an application, probably to work in the tool room, but he was told that no jobs were available. Claimant stated he thought he could do a desk job or paperwork. (Tr. 50).

Before he underwent surgery, Claimant worked at several different temporary jobs. He testified that on one job, he washed a pipe, and he also did some lawn service work. In addition, Claimant worked in maintenance at an apartment complex. (Tr. 24). Claimant

affirmed that he worked for the temporary agency between December 1999 and 2001. (Tr. 32). In August 2001, Dr. Charles Murphy performed surgery on Claimant, and in December 2001, Dr. Murphy determined Claimant had reached maximum medical improvement (MMI). (Tr. 24-25). At that time, Dr. Murphy told Claimant that he would not be able to return to work as a welder. In addition, Dr. Murphy gave Claimant permanent restrictions, including no squatting, no climbing and no kneeling. (Tr. 28).

Claimant returned to Employer to see whether any jobs were available within his permanent restrictions. (Tr. 29). Claimant testified that he spoke with Mr. Black Pertuit, who told him that they had no jobs for him. (Tr. 29, 50). Claimant then began seeking employment elsewhere, which he has continued to do up to the present time. (Tr. 29). Claimant was not sure of when specificially he started looking for work after being released. (Tr. 51, 52). Claimant did not know whether or not he applied for any jobs before May 24, 2002. Claimant agreed that he applied for jobs in May, June, July and August 2002. (Tr. 54). Claimant testified that he thought he started keeping notes on the jobs he applied for and agreed it was possible that he had applied for jobs before May, although he could not recall. (Tr. 55-56).

Claimant testified that he got some jobs with a temporary agency in July 2002 and also put in applications for other jobs. (Tr. 29, 32). However, some jobs were not hiring, and other jobs had already been filled by the time Claimant applied for them. (Tr. 29). Claimant testified that he has worked a total of thirty hours since December 2001, mostly doing lawn service jobs. (Tr. 32-33). Claimant explained that he could not have done any more work than that, even if he had wanted to, because the man who owned the lawn service only gave Claimant the jobs to help him out. (Tr. 33-34). Claimant affirmed that he also received assistance in his job search from Dot Moffett, a vocational rehabilitation counselor. (Tr. 30). Claimant first met with Ms. Moffett on September 16, 2002. (Tr. 30). At their meeting, she tested Claimant and asked him questions about his background. Ms. Moffett also gave Claimant some job leads, which he followed up on. (Tr. 31, 53).

Claimant applied for a meat-cutting job at Zuppardo's Supermarket, but they never called him. Claimant also applied for a job moving cars at Bryan car dealership, but no one ever called him, and he was unable to get in and out of the small cars anyway. (Tr. 34). Claimant applied for some jobs driving semi-trucks or doing small package delivery, but he did not have a Class A license. Claimant applied for an auctioneer job, but they were not hiring. Likewise, he applied at some apartment complexes, but they also were not hiring. (Tr. 35). Claimant applied at some guard services, but one company was not hiring and the other company required prospective employees to pay a fee and undergo a background check. (Tr. 35-36). Claimant testified he did not pay the $5-$10 fee because he did not have the money. (Tr. 36).

Claimant called about a job with a GMC fabrication company, but they had already filled the position. (Tr. 37). Claimant applied for a job with a company that puts burglar bars on windows, but he was not hired. (Tr. 37-38). Claimant applied for a car washing lot attendant job at a Saturn dealership and a job as a shuttle bus driver at Treasure Chest casino, but the positions had already been filled. (Tr. 38). Claimant applied for some of these jobs on his own, and other jobs he learned about from Ms. Moffett. (Tr. 36-37). He and Ms. Moffett also did a computer search to find available jobs, although they were not able to find any that way. Claimant stated that he looked for jobs on a "pretty regular" basis. (Tr. 37). Claimant testified that he applied for some driving jobs after August 21, 2002, although he was not sure of the exact dates that he applied. (Tr. 54-55).

Claimant testified that he did not apply to be a bellman at La Quinta hotel, nor did he apply for a room monitor job. (Tr. 38). Claimant did not apply for a cashier's job at the airport. Claimant testified that he was not aware of the cashier job. (Tr. 39). Claimant did not recall ever receiving any letters from Ms. Moffett that listed various job opportunities. (Tr. 39-40). According to Claimant, he learned about jobs from Ms. Moffett during their meetings. Claimant affirmed that he pursued every job lead that Ms. Moffett gave him. (Tr. 40).

Claimant testified that he supports himself by doing odd jobs, and he does not make enough money to pay his bills. Although his wife works, they are still unable to keep up with their bills. Claimant testified that he wants to return to the workforce and is working hard to find a new job. (Tr. 41). He most recently looked for a job a week or two weeks before the hearing in this case, after receiving a new list of prospective job opportunities. (Tr. 56-57). Claimant testified that one of these jobs was the auctioneer job and the other was a driving job for which he needed a Class A license. (Tr. 57).

Testimony of Wiltz Joseph Bordelon, Jr.

Mr. Bordelon is a welding supervisor who has worked for Employer for twenty-eight years. (Tr. 64). Before he became a welding supervisor, Mr. Bordelon was a welder for twenty years. Mr. Bordelon affirmed that he used to supervise Claimant, although he was unsure of when he did so. Mr. Bordelon was aware that Claimant was injured while working for Employer. (Tr. 65). He testified that on two occasions, Claimant presented him with some restrictions which Claimant's doctor had given him, but Mr. Bordelon did not remember when this occurred. (Tr. 66, 67). Mr. Bordelon explained that usually when an employee returns to work with restrictions, he tries to determine whether the employee can be put to work within his restrictions. (Tr. 67). Occasionally there is no work available within the restrictions, but Mr. Bordelon agreed that if there was work available, he personally would ensure that the job fell within the restrictions. If an employee was still unable to do the job with restrictions, Mr. Bordelon would send the employee to First Aid.

(Tr. 68, 69-70). In addition, Mr. Bordelon would try to find the employee a less strenuous job immediately. (Tr. 69).

Mr. Bordelon affirmed that he signed a form indicating that restricted work was available for Claimant on July 26, 1999. Claimant's restrictions at that time included decreased walking and standing, and the job that Mr. Bordelon assigned to Claimant involved sitting on a bucket, dragging a rod and using a MIG gun. (Tr. 71). Mr. Bordelon testified that there is climbing involved in that job, as the welders have to climb by ladder up to the welding machines. (Tr. 72). Although Mr. Bordelon would not have told Claimant not to walk and stand on the job, Claimant could have come to Mr. Bordelon if he was having problems doing the job. (Tr. 73). On this particular occasion, Claimant only worked for a few hours before telling Mr. Bordelon that he could not work because his knee hurt. Mr. Bordelon sent Claimant to First Aid. He did not recall whether Claimant requested him to modify the job so that no climbing would be involved but stated that climbing would not have been an issue because there are other ways of adjusting the machines without climbing. (Tr. 74).

Mr. Bordelon testified that on a second occasion, basically the same situation occurred. Claimant returned with restrictions, Mr. Bordelon assigned him a job and Claimant came to him a few hours later complaining that he was unable to do the job. (Tr. 76). This time, Claimant had a no climbing restriction, but he still was unable to work. (Tr. 77-78). Mr. Bordelon did not know whether Claimant actually did the climbing but stated that Claimant did not have to do it. He again sent Claimant to First Aid. Mr. Bordelon testified that this occasion was the last time that he saw Claimant at work. (Tr. 78).

Mr. Bordelon acknowledged that in Claimant's particular case, he did not specifically recall discussing the climbing issue and the alternative ways of using the welding machine. (Tr. 80). Mr. Bordelon thought that he told someone else to come and adjust Claimant's machine. He testified that even if he had not done so, Claimant would only have had to remind him about the climbing restriction and he would have taken care of it. (Tr. 80-81). Mr. Bordelon explained that because welders work in such close proximity, it would not be difficult for one worker to adjust the machine for another worker. (Tr. 81).

Testimony of Dorothy Moffett-Douglas

Ms. Moffett has a Master's degree in counseling and has worked as a vocational counselor for twenty-eight years. (Tr. 86). In February 2002, she was asked to review Claimant's past work experience and training as well as his medical records in order to determine his employability. (Tr. 87). At that time, Ms. Moffett concluded that Claimant would not be able to return to welding work, based on the doctor's restrictions in the file. (Tr. 88-89). She further concluded that Claimant could do entry-level jobs appropriate for

high school graduates, in addition to undergoing on-the-job training or classroom training for other jobs appropriate for high school graduates. Ms. Moffett then conducted a labor market survey to find suitable positions given Claimant's qualifications. (Tr. 89). The labor market survey included jobs that were available at the time that Claimant reached MMI in December 2001. (Tr. 89-90).

Ms. Moffett testified that she was asked to select three or four jobs that were appropriate for Claimant but that she could have identified more than four available positions. (Tr. 106, 135-36). The jobs available at the time that Claimant reached MMI had a wage rate of about $6 per hour. (Tr. 90). The positions available included security officer, car lot porter and supermarket meat clerk. (Tr. 90-91). Ms. Moffett thus concluded that there was suitable work available for Claimant from the date of December 20, 2001 to February 2002. She explained that she was able to determine which jobs were available in December 2001 by referring to three or four previous labor market surveys prepared for other claimants. (Tr. 91, 106). Ms. Moffett explained that her report was entitled "Hypothetical Labor Market Survey" because she had not met Claimant at the time, and her report was based on other people with similar background, education, training and physical restrictions. (Tr. 100-101). She acknowledged that the jobs that she identified were available in early December 2001, and she did not know whether those jobs were still available on December 20, 2001. (Tr. 108-109).

Ms. Moffett identified some additional jobs on February 24 and 26, 2002. She affirmed that she personally contacted these employers and asked them about the physical requirements of the jobs. (Tr. 113). Ms. Moffett stated that she did not specifically discuss Claimant because she did not know him at that point. (Tr. 114). Ms. Moffett testified that the security job position was available in February 2002 for light duty workers such as Claimant, because some security officers are unarmed and work at a desk, checking identification and watching the monitors. (Tr. 119-23). She acknowledged that both of the security jobs required a background check which must be paid for by the employee. (Tr. 123). She acknowledged that the car lot job would require some bending, stooping and kneeling. (Tr. 114). Ms. Moffett testified that to her knowledge, Claimant's physical restrictions included limited bending and squatting. (Tr. 115). However, at the time she prepared her initial report, she was only aware that Claimant was restricted to light duty, and she did not learn about the specific restrictions until Claimant told her at their first meeting. (Tr. 117-18, 132). Ms. Moffett agreed that she would have eliminated some of the jobs had she been aware of Claimant's restrictions of no squatting, kneeling or climbing. (Tr. 118-19, 120-21).

In September 2002, Ms. Moffett met with Claimant and obtained additional background information on him. (Tr. 92). Ms. Moffett also tested Claimant at this time and determined that he read at a seventh grade level, which is below the national average for high

school graduates. (Tr. 102). Claimant had fifth grade level math skills. (Tr. 102-103). On a valid Wide Range Achievement Test, Claimant's scores were below average for a high school graduate. (Tr. 103). Ms. Moffett agreed that Claimant's low scores would affect the type of jobs that he could get in the United States, but she did not believe it would affect his ability to get jobs in the New Orleans area. She suggested on-the-job training and special education could be beneficial for someone like Claimant. (Tr. 104).

Ms. Moffett acknowledged that without special training, Claimant would be at a disadvantage in the job market. (Tr. 105). However, Ms. Moffett testified that Claimant's scores did not affect her opinion as to whether Claimant was qualified for the positions that she identified. (Tr. 133). In fact, Ms. Moffett testified that the new information added to Claimant's potential for employment. (Tr. 96-97). The additional information also was helpful to her because it gave her a better idea of what types of jobs interested Claimant. (Tr. 93). She eliminated some jobs that Claimant was not interested in doing, but for the most part, the jobs that Ms. Moffett had listed in February 2002 were still appropriate positions for Claimant. (Tr. 93-94).

After the interview, Ms. Moffett conducted another labor market survey and found additional job opportunities for Claimant. (Tr. 94-95). She specifically identified three jobs. A bellman job involved assisting customers at a hotel with their luggage and parking their cars. Ms. Moffett acknowledged that this job would require Claimant to lift and move luggage and possibly to climb stairs. In her opinion, Claimant was capable of handling the luggage. A room monitor job involved checking identification and badges for conventions. (Tr. 124). Ms. Moffett found this job on the internet and did not actually speak to the employer, so she did not know whether the job was actually available at the time she found it. (Tr. 125-26). She noted, however, that these jobs are updated daily. (Tr. 126). Finally, Ms. Moffett identified a shuttle bus driver position which required a commercial driver's license. She believed Claimant was physically capable of doing the job and advised him to get the commercial driver's license. (Tr. 127).

Ms. Moffett scheduled another meeting with Claimant to go over the labor market survey and assist him with his job-seeking skills. (Tr. 95). At that time, Claimant told her that he wanted to work for an auto auction in delivery or sales. (Tr. 97). Ms. Moffett testified that this job required a commercial driver's license as well. (Tr. 138). Ms. Moffett met with Claimant again on October 16, 2002, and reported that he applied for several jobs from the labor market survey. (Tr. 97-98). Ms. Moffett ran a test and found that Claimant was interested in management-type positions, so she recommended that he look for entry-level retail or restaurant management positions. Ms. Moffett assisted Claimant with job development in personnel service occupations and made some calls on Claimant's behalf.

On November 6, 2002, Claimant and Ms. Moffett ran a computer job search. (Tr. 98). On November 10, Ms. Moffett also added new available positions to the labor market survey. (Tr. 95-96, 128). These jobs included a cashier position that Ms. Moffett found in the newspaper as well as another security officer position. (Tr. 128). She testified that the cashier job was a sedentary position sitting at the airport parking garage. (Tr. 129). Ms. Moffett stated that she knew it was a sedentary position based on her personal knowledge of airport parking security. (Tr. 129-30). She did not know how many of those positions were available. Finally, Ms. Moffett identified a mail courier position for Claimant. (Tr. 130-31). She did not know whether this job was appropriate for Claimant and told Claimant to speak with the interviewer to get the specifics of the job. (Tr. 131).

Ms. Moffett did not have any information on what specific jobs were available to Claimant between February 27, 2002, and September 16, 2002. (Tr. 132). Claimant had expressed an interest in hotel and airport services, and Ms. Moffett testified that there would probably have been positions turning over every week within those industries during the time period in question. She also thought that mail courier positions and locksmith positions would probably have been available during that time frame. (Tr. 134-35).

Ms. Moffett acknowledged her awareness that Claimant was working for a temporary agency as a day laborer. (Tr. 99-100). She affirmed that Claimant told her he had been looking for jobs before their first interview. She agreed that Claimant was cooperative and followed her suggestions and requests. (Tr. 137). Ms. Moffett testified that in her opinion, Claimant has been employable since December 20, 2001. (Tr. 99).

Deposition of Ralph P. Katz, M.D.

Dr. Katz is an orthopedic surgeon who first examined Claimant on July 23, 1999. (EX. 17, pp. 4-5). Claimant told Dr. Katz that he had been injured when he caught his right knee on the corner of a doorjamb while walking down some stairs. Claimant stated that he was initially treated with a heating pad, whirlpool and Motrin, which helped with the pain. (EX. 17, p. 5). Claimant returned to light duty but had difficulty with kneeling. (EX. 17, p. 6). After seeing a doctor, Claimant was referred to Dr. Katz for right knee pain and swelling. (EX. 17, pp. 5, 6). Dr. Katz testified he did not know what Claimant's light duty job had entailed, nor did he know how long Claimant worked in the light duty job. (EX. 17, pp. 6-8, 11).

Claimant told Dr. Katz that he had injured his knee ten years prior to the workplace accident but had not had any more problems with it since that time. Claimant complained of pain along the interior aspect of the knee with ambulation, especially extension and kneeling. Claimant was able to sit down and lie down without experiencing pain, and his

knee was not popping, locking or clicking. Claimant had some pain with giving way but was unable to feel any instability in his knee because of the pain. (EX. 17, p. 7).

Upon physical examination, Dr. Katz determined that Claimant had a normal gait and his knee was not swollen. Claimant had excellent motion in his knee. Dr. Katz did find that Claimant had tenderness over the inferior pole on the patella and reproducible pain with compression of the area. He diagnosed Claimant with patella tendinitis. (EX. 17, p. 8). Dr. Katz also took some X-rays, which had negative findings. (EX. 17, pp. 8-9). He planned to give Claimant some knee injections, anti-inflammatories and pain medication. Dr. Katz wanted to return Claimant back to work immediately at light duty capacity and told Claimant to wear knee pads at work. Dr. Katz told Claimant that his condition was self-limiting and should resolve on its own. Dr. Katz did not place any additional restrictions on Claimant. (EX. 17, p. 9).

Claimant returned to see Dr. Katz on August 13, 1999, still complaining of right knee pain. (EX. 17, pp. 9-10). Claimant told Dr. Katz he had tried to return to work but he was sent home because he was unable to do his job. Dr. Katz testified that Claimant never said who had sent him home. Claimant wanted to be put on workers' compensation, but Dr. Katz told Claimant that it was not his decision to make and that Claimant needed to go through the proper channels to receive workers' compensation. (EX. 17, p. 10). Claimant told Dr. Katz he had missed too much work because of the problem and wanted to go back to work. (EX. 17, p. 12).

Claimant reported that the injection had given him some pain relief, but other than that, his complaints were unchanged from the first visit. (EX. 17, pp. 11-12). On physical examination, Claimant had no pain over the patella tendon but did have some pain over the patellofemoral joint. Dr. Katz concluded that Claimant's patella tendinitis had improved but that he had more of a patellofemoral pain at that time. Dr. Katz planned to continue treating Claimant conservatively. He also recommended that Claimant undergo an MRI to further evaluate the knee. (EX. 17, p. 12). Claimant was to continue taking his medications, and Dr. Katz told him to return to work with restrictions of no kneeling and no stair climbing. (EX. 17, pp. 12-13).

In a letter to Employer dated August 25, 1999, Dr. Katz reported that Claimant's MRI showed a complex tear of the posterior horn of the medial meniscus as well as some irregularities around the ACL. (EX. 17, pp. 13-14). Dr. Katz stated that the ACL irregularities indicated the possibility of an old injury. Dr. Katz stated that in Claimant's more recent workplace injury, he apparently hit his knee directly on the doorjamb and there was no twisting or rotating involved. Dr. Katz also noted that Claimant had no popping, clicking or locking of his knee and that Claimant's pain was centered over the patella tendon. Dr. Katz thus concluded that due to the complex nature of the meniscal tear and the remote

history of the previous injury, Claimant had an old injury which was exacerbated by the workplace injury. (EX. 17, p. 14). Dr. Katz later explained that while Claimant's workplace accident could have aggravated a pre-existing degenerative change, it did not aggravate a meniscal tear or an ACL injury. (EX. 17, pp. 48, 49, 51-52). In Dr. Katz's opinion, the meniscal tear was not caused by Claimant's workplace accident. (EX. 17, pp. 16, 57). Dr. Katz affirmed that his opinion is still the same at the present time. (EX. 17, pp. 14-15).

Claimant returned to see Dr. Katz on September 3, 1999. He was unable to get workers' compensation on his right knee because of the letter that Dr. Katz had written to Employer. Dr. Katz explained that Claimant's MRI results were not consistent with the injury that he described, indicating a pre-existing injury. Claimant reported that his knee was still painful, and although he wished to return to work, he was unable to do so because there was no light duty available for him. (EX. 17, p. 15). Dr. Katz recommended that Claimant decide what he wanted to do about his knee and whether he wanted to use his private insurance or not. According to Dr. Katz, surgery was an option for Claimant at that time. (EX. 17, p. 16). Dr. Katz testified that he still thought Claimant could do light duty work within the given restrictions. (EX. 17, pp. 16-17).

Dr. Katz saw Claimant again on September 23, 1999. Claimant reported that he still had not returned to work and had been trying to get workers' compensation. Dr. Katz reiterated his opinion that Claimant's meniscal tear was not directly attributable to Claimant's accident, but Claimant was "quite insistent" in disagreeing with Dr. Katz's opinion. (EX. 17, p. 17). Claimant reported that his knee pain had improved somewhat but he still had problems squatting, kneeling and climbing stairs. (EX. 17, p. 18). Dr. Katz told Claimant that he would continue to treat him conservatively with injections, medications or quad rehab. Dr. Katz felt Claimant was capable of working and could return to work with the restrictions on squatting, climbing stairs and kneeling. (EX. 17, p. 19).

In November1999, Dr. Katz informed Employer's representative that he had told Claimant that his symptoms were coming from his patellofemoral joint injury, not from the meniscal tear. Claimant, however, believed that his entire injury was caused by the workplace accident. (EX. 17, p. 20). Dr. Katz told the representative that Claimant could aggravate his pre-existing condition, so he gave Claimant a note to return to work with the same restrictions as before. (EX. 17, pp. 20-21). Dr. Katz hoped that the note would enable Claimant to find a light duty position in the sheet metal shop. (EX. 17, p. 21). In a letter dated December 8, 1999, Dr. Katz informed Employer's representative that Claimant did not want to return to work. Dr. Katz acknowledged that Claimant still had patellofemoral pain, but in Dr. Katz's opinion, Claimant had plenty of time to recuperate from the injury and should be put back to normal work status as of December 15, 1999. (EX. 17, p. 23). According to Dr. Katz, the patella tendinitis resolved on its own. (EX. 17, pp. 23, 25).

Dr. Katz testified that he offered to perform a surgical procedure on Claimant in order to inspect the back of the kneecap and address the meniscal tear and ACL problems. (EX. 17, p. 24). Dr. Katz explained that the purpose of this surgery would be to see if Claimant had any degenerative changes on the underside of his kneecap which could be causing some of his symptomatology. (EX. 17, pp. 38-39). Dr. Katz agreed that these sorts of changes would be attributable to Claimant's workplace accident. He explained that usually this operation is not intended to treat the knee but rather to inspect the knee and confirm a diagnosis. (EX. 17, p. 39). However, if Dr. Katz had found any degenerative changes associated with the meniscal tear, he would have done something about it. (EX. 17, p. 57). Dr. Katz stated that if he had confirmed his previous diagnosis with such a surgery, he would have continued to treat Claimant conservatively and might have placed more restrictions on Claimant as well. (EX. 17, p. 40). Claimant continued to insist that his ACL and meniscus injuries were directly related to his workplace accident. (EX. 17, pp. 25-26).

Claimant returned to see Dr. Katz on December 30, 1999, with the same general complaints about right knee pain. He reported that he had not returned to work. (EX. 17, pp. 26-27). On physical examination, Claimant had some reproducible pain over the patellofemoral joint and mild tenderness over the patellar tendon, meaning that when Dr. Katz activated Claimant's quadriceps, Claimant had pain over his kneecap. (EX. 17, pp. 27-28, 36, 41, 44). Dr. Katz affirmed that this is an objective test and agreed that Claimant did show objective signs of symptomatology for his work-related condition. (EX. 17, pp. 36, 37-38). Nevertheless, Dr. Katz released Claimant to full duty with no restrictions but advised him to avoid doing activities which hurt him. (EX. 17, pp. 28-29, 32, 44). He agreed he might have decided to put restrictions on Claimant again if Claimant's problems persisted. (EX. 17, pp. 29, 55). Dr. Katz admitted that Claimant's pain had not actually resolved itself by December 30, 1999. (EX. 17, p. 41).

Dr. Katz explained the difference between giving patients restrictions and recommending that they avoid certain activities that cause them pain. A restriction means that the patient is specifically told *not* to do something by the doctor, whereas a suggestion to avoid activities indicates that the doctor has done all he can do to treat the problem and now it is up to the patient to determine how to deal with activities that cause pain. (EX. 17, pp. 34, 42-43).

Claimant's last appointment with Dr. Katz was on January 20, 2000. (EX. 17, p. 29). Claimant had the same complaints, and the physical examination revealed no new findings. (EX. 17, pp. 29-30). Dr. Katz testified that the axial loading test he performed on Claimant was a subjective and objective test where the doctor pushes on the kneecap and the patient indicates whether it is painful or not. (EX. 17, p. 56, 58). Dr. Katz agreed that Claimant's subjective response was consistent with the objective finding of patellofemoral pain. (EX. 17, p. 59). At that point, Dr. Katz told Claimant he had several options. Dr. Katz could

continue treating him conservatively, Claimant could seek a second opinion or Dr. Katz could perform an arthroscopy on Claimant's knee. Claimant asked Dr. Katz to put him on light duty, but Dr. Katz refused to do so. (EX. 17, p. 30). The two again had a disagreement about workers' compensation and the cause of Claimant's knee pain. (EX. 17, pp. 30-31, 55). In any case, Dr. Katz felt that no further treatment was necessary with regard to Claimant's workplace knee injury. (EX. 17, pp. 32-33, 55).

On cross-examination, Dr. Katz testified that he believed Claimant did have patellofemoral pain at first. (EX. 17, pp. 35, 36). He noted, however, that Claimant was "a very difficult patient to deal with" because he disagreed with Dr. Katz's assessment about the cause of his pain. (EX. 17, p. 35). In Dr. Katz's opinion, Claimant's condition improved over the course of treatment. When Claimant continued to complain of pain, Dr. Katz did not know to what degree Claimant actually had pain. Dr. Katz explained that he questioned the degree of Claimant's pain because Claimant had "other motives," namely that he wanted workers' compensation to cover his treatment for the knee injury. (EX. 17, p. 36). Dr. Katz acknowledged that he was skeptical of Claimant's subjective complaints of pain because he and Claimant kept disagreeing about the nature of Claimant's injury. (EX. 17, p. 38).

When told that another doctor had ultimately performed an arthroscopy on Claimant's knee, Dr. Katz stated that he had no problem with that and affirmed that he simply did not think the need for surgery was related to the workplace accident. In Dr. Katz's opinion, any time that Claimant was recovering from surgery and unable to return to work would also be unrelated to the workplace accident. (EX. 17, p. 31).

Deposition of George Murphy, M.D.

Dr. Murphy is an orthopedic surgeon who first saw Claimant on February 21, 2000. (CX. 1, pp. 4-5). At that time, Claimant recounted the history of his workplace injury and subsequent treatment with Dr. Katz. Claimant complained of pain on the medial side of the knee and reported that his knee felt like it would give out. Claimant did not report any previous problems with his knee. Upon physical examination, Claimant had some pain when Dr. Murphy applied pressure to his patella, as well as some tenderness to the medial joint line. There was evidence of instability of effusion in Claimant's knee. (CX. 1, p. 6). Dr. Murphy recommended that Claimant take Vioxx and do some quadriceps exercises. (CX. 1, pp. 6-7). Claimant was to obtain his MRI films and Dr. Katz's medical reports so that Dr. Murphy could review them.

Claimant returned to Dr. Murphy on March 13, 2000. Claimant reported that his knee still hurt and the medication had not helped. Dr. Murphy studied Claimant's MRI, which indicated a probable torn medial meniscus. Dr. Murphy then advised Claimant that his only option would be arthroscopic knee surgery. Claimant was to continue with the quadriceps

exercises before undergoing surgery. (CX. 1, p. 7). Dr. Murphy testified that Claimant could not have returned to work before the surgery, except perhaps in a sedentary capacity. (CX. 1, pp. 7, 12-13).

After the initial surgery recommendation, Dr. Murphy saw Claimant on two additional occasions, and Claimant's condition remained unchanged. (CX. 1, pp. 7-8). Dr. Murphy last saw Claimant on June 22, 2000, and Claimant still had not undergone surgery. Dr. Murphy again advised Claimant that surgery was his only option. (CX. 1, p. 8).

Upon reviewing Dr. Katz's records, Dr. Murphy observed that Claimant had a previous knee injury, possibly of the medial meniscus, and concluded that it was possible that some of Claimant's changes on the MRI predated his workplace injury. (CX. 1, p. 9; EX. 18, p. 61). Nonetheless, Dr. Murphy felt that the arthroscopy was necessary based on the aggravation caused by Claimant's workplace injury. (CX. 1, p. 9). In Dr. Murphy's opinion, the meniscal tear itself was either caused by or aggravated by the injury, based on the fact that Claimant had been working without any problems prior to the 1999 injury. (CX. 1, pp. 9, 12, 15, 18). Claimant never told Dr. Murphy he had a history of a previous knee injury, but when Dr. Murphy reviewed the records of this injury, he felt that the injury was only a minor sprain which "may not have made any impression." (CX. 1, pp. 9-10). Dr. Murphy pointed out that if this knee condition had been serious, Claimant would likely have shown some symptoms before he had the workplace accident in 1999. (CX. 1, pp. 16-17). However, Dr. Murphy noted that merely twisting the knee can aggravate a knee condition. (CX. 1, pp. 17-18).

When asked about Dr. Katz's treatment of Claimant, Dr. Murphy stated that putting a patient on light duty prior to surgery may be appropriate, but when there is a delay in treatment, the patient undergoes a much longer recovery time after surgery. (CX. 1, pp. 10-11). Dr. Murphy testified that after surgery, Claimant would probably be able to return to some type of employment. (CX. 1, pp. 11, 13). He noted that with a torn meniscus, more damage can occur if a patient delays the surgery. (CX. 1, pp. 11, 13, 16). Dr. Murphy was unaware that his brother, Dr. Charles Murphy, had performed surgery on Claimant in August 2001. (CX. 1, pp. 11-12). Dr. Murphy affirmed that his bill of $495 was paid by Claimant's attorney. (CX. 1, p. 16).

When told that Dr. C. Murphy had placed permanent restrictions on Claimant, Dr. Murphy agreed that restrictions would probably be appropriate given the fact that Claimant had "significant problems" with his knee. (CX. 1, pp. 13-14). Dr. Murphy did not know what percentage of permanent impairment Claimant would have because he had not treated Claimant since before the surgery. (CX. 1, pp. 14-15).

Medical Records of Charles Murphy, M.D.

On August 23, 2001, Dr. Murphy performed surgery on Claimant. Dr. Murphy determined that Claimant could return to light duty work on November 30, 2001. According to Dr. Murphy's restrictions, Claimant was not to put any excess stress on his right knee. Claimant was restricted from squatting, kneeling and climbing. He was required to attend physical therapy three times a week. (EX. 15, p. 3). In a follow up evaluation on December 20, 2001, Dr. Murphy determined that Claimant had reached MMI with a 7% lower extremity impairment and a 3% whole person impairment. (EX. 15, p. 4). Dr. Murphy gave Claimant permanent restrictions of no squatting, kneeling or climbing. (EX. 16, p. 5).

IV. DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g 990 F.2d 730 (3d Cir. 1993).

I found Claimant to be a credible witness and have weighed his testimony accordingly.

Causation

Section 20(a) of the Act provides a claimant with a presumption that his disabling condition is causally related to his employment if he shows he suffered a harm and employment conditions existed which could have caused, aggravated or accelerated the condition. Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). Once the claimant proves these elements, the

claimant has established a prima facie case and is entitled to a presumption that the injury arose out of the employment. Keliata v. Triple Machine Shop, 13 BRBS 326 (1981); Adams v. General Dynamics Corp., 17 BRBS 258 (1985). With the establishment of a prima facie case, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. Del Vecchio v. Bowers, 296 U.S. 280 (1935).

An injury occurs when something unexpectedly goes wrong within the human frame. Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968). An external, unforeseen incident is not necessary; experiencing back pain or chest pain at work can be sufficient. Darnell v. Bell Helicopter Int'l Inc., 16 BRBS 98 (1984). If an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant condition is compensable. The relative contributions of the work-related injury and prior condition are not weighted in determining Claimant's entitlement ("aggravation rule"). Wheatley, 407 F.2d at 307.

In this case, it is undisputed that Claimant suffered a work-related injury in March 1999. The issue is whether this work-related injury either caused or aggravated a meniscal tear in Claimant's right knee. Claimant testified that although he had a previous knee injury, he never had any problems at work until after the 1999 workplace accident. I find that Claimant has established a prima facie case that his workplace injury either caused or aggravated a meniscal tear for which he later required surgery. Claimant is therefore entitled to the 20(a) presumption.

Once the presumption is invoked, the burden shifts to the employer to rebut the presumption by presenting substantial countervailing evidence that the injury was not caused by the employment. See 33 U.S.C. § 920(a). The Fifth Circuit addressed the issue of what an employer must do in order to rebut a Claimant's prima facie case in Conoco v. Director, OWCP, 194 F.3d 684 (5th Cir. 1999). In that case, the Fifth Circuit held that to rebut the presumption, an employer does not have to present specific and comprehensive evidence ruling out a causal relationship between the claimant's employment and his injury. Rather, to rebut a prima facie presumption of causation, the employer must present substantial evidence that the injury is not caused by the employment. Noble Drilling v. Drake, 795 F.2d 478 (5th Cir. 1986), cited in Conoco, 194 F.3d at 690.

Employer has relied on Dr. Katz's testimony as evidence that Claimant's torn meniscus and ACL injuries were pre-existing conditions that were neither caused nor aggravated by Claimant's 1999 workplace accident. Dr. Katz treated Claimant for patellofemoral pain after the accident. According to his testimony, the pain described by Claimant was consistent with a blow to the knee but had nothing to do with the meniscal tear

which appeared on Claimant's MRI. Previous medical records indicate that Claimant suffered a knee injury, possibly to the medial meniscus, in 1992. (EX. 18, p. 25). Dr. Katz concluded that although Claimant did have a torn meniscus, it was not the cause of his pain. I find that Employer has presented sufficient evidence to rebut the 20(a) presumption in this case.

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Volpe v. N.E. Marine Terminals, 671 F.2d 697 (2d Cir. 1982); Del Vecchio v. Bowers, 296 U.S. 280 (1935).

Because Dr. Katz and Claimant disagreed on both the cause of Claimant's pain and Claimant's ability to return to full duty work without restrictions, Dr. Katz urged Claimant to get a second opinion. Dr. Murphy, who advised Claimant that surgery was his only option, concluded that Claimant's workplace injury had either caused or aggravated his meniscal tear. Dr. Murphy was not concerned with Claimant's previous knee injury, as it appeared to be a minor sprain for which Claimant did not require much treatment. In addition, after that initial injury, Claimant had returned to work and had continued as a full duty welder for seven years, until his second knee injury occurred in 1999. Because Claimant had not shown any symptoms of a knee injury before that time, Dr. Murphy felt that the original knee injury had not been serious.

The fact that there is no other explanation for Claimant's sudden and persistent knee pain leads me to agree with Dr. Murphy's line of reasoning, despite Dr. Katz's testimony to the contrary. In addition, Dr. Katz could offer no explanation for why Claimant continued to experience pain from a condition that, according to Dr. Katz, should have resolved itself shortly after the injury occurred. Based on Claimant's testimony, he seems to have difficulty with verbal communication. Perhaps he failed to fully explain to the doctors how his knee injury occurred or where his knee was hurting him. In any case, it is clear from Claimant's testimony that he never had knee problems before the injury, and after the injury, his knee problems became so severe that he was unable to work and eventually had to undergo surgery to correct a torn meniscus. In the absence of another explanation, it is difficult not to see a causal link between the knee injury and the subsequent need for knee surgery.

Accordingly, I find that Claimant's meniscal tear was either caused or aggravated by his employment.

Nature and Extent

Having established work-related injuries, the burden rests with the Claimant to prove the nature and extent of his disability, if any, from those injuries. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1985). A Claimant's disability is

permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989); Trask, 17 BRBS at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette W. Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enter., Ltd., 14 BRBS 395 (1981).

The Parties in this case have stipulated that Claimant reached MMI on December 20, 2001, with a permanent disability of 7% right lower extremity impairment.

As a general rule, if an injury occurs to a body part specified in the statutory schedule, then the injured employee is limited to the permanent partial disability schedule of payments contained in Section 908(c)(1) through (20). The rule that the schedule of payments is exclusive in cases where the scheduled injury, limited in effect to the injured part of the body, results in a permanent partial disability was thoroughly discussed by the Supreme Court in Potomac Elec. Power Co. v. Director, OWCP, 449 U.S. 268 (1980) [hereinafter "PEPCO"]. However, a schedule injury can give rise to permanent total disability pursuant to § 908(a) in a situation where the facts show that the injury prevents a claimant from engaging in the only employment for which he is qualified. PEPCO, 449 U.S. at 277 n.17. Therefore, if a claimant establishes that he is totally disabled, the schedule becomes irrelevant. Dugger v. Jacksonville Shipyards, 8 BRBS 552 (1978), aff'd, 587 F.2d 197 (5th Cir. 1979).

A claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which the employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991).

The claimant's credible complaints of pain alone may be enough to meet his burden. Anderson v. Todd Shipyards Corp., 22 BRBS 20 (1989); Richardson v. Safeway Stores, 14 BRBS 855 (1982); Miranda v. Excavation Constr., 12 BRBS 882, 884 (1981); Golden v. Eller & Co., 8 BRBS 846 (1978); aff'd, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). A physician's opinion that the employee's return to his usual or similar work would aggravate his condition is sufficient to support a finding of total disability. Care v. Washington Metro. Area Transit Auth., 21 BRBS 248 (1988); Lobue v. Army & Air Force Exch. Serv., 15 BRBS

407 (1983); Sweitzer v. Lockheed Shipbuilding & Constr. Co., 8 BRBS 257, 261 (1978). If the physician recommends surgery and light duty work and the claimant experiences pain while performing many activities, he has also met his burden. Carter v. General Elevator Co., 14 BRBS 90 (1981).

Although the Parties agree that Claimant has reached MMI, they disagree as to whether Claimant is entitled to compensation for temporary total and temporary partial disability from December 29, 1999, the day that Employer stopped paying compensation benefits, through August 22, 2001, the day before Claimant underwent an arthroscopy on his right knee. In December 1999, Dr. Katz released Claimant to full duty without restrictions, despite the fact that Claimant was still experiencing knee pain and had been unable to return to work for several months, even though Employer had attempted to accommodate his restrictions. Dr. Katz acknowledged that Claimant had objective symptomatology but decided that restrictions were unnecessary. He simply advised Claimant to avoid doing activities which caused him pain. When Claimant first saw Dr. Murphy a few months later, Dr. Murphy told him that he needed surgery and should do only sedentary work in the meantime. Claimant testified that Dr. Murphy told him that he could not return to work as a welder until after the surgery. Although Claimant returned to Employer with his restrictions, Employer never offered him a light duty job.

While Mr. Bordelon testified that he would have accommodated Claimant's restrictions so that Claimant did not have to climb at work, Mr. Bordelon only dealt with Claimant's restrictions during the time after March 1999 and before December 1999. Employer presented no evidence that it offered Claimant restricted duty work once it stopped paying compensation benefits. Instead, Employer has argued that Claimant was fully capable of returning to full duty work and simply chose not to do so. Claimant testified, however, that he wanted to return to work but was physically incapable of doing so because of his knee pain. Other than Dr. Katz's opinion, which is in direct conflict with that of Dr. Murphy, there is no other evidence to indicate that Claimant was in fact able to return to full duty as a welder. The record indicates that Claimant attempted to return to full duty during 2000 but was unable to do the work. (EX. 18, p. 60). By contrast, the record does not indicate that Employer attempted to accommodate Claimant's restrictions once he was restricted to sedentary duty by Dr. Murphy. Employer believed that Claimant's need for surgery was unrelated to his complaints of pain, and therefore Employer did not need to accommodate Claimant once Dr. Katz released him. The evidence, however, indicates otherwise. Accordingly, I find that Employer is responsible for paying temporary total and temporary partial disability benefits to Claimant in the stipulated amount of $19,881.98 for the time period between December 29, 1999, and August 22, 2001.

In regards to Claimant's entitlement to permanent total disability compensation, the Parties agree that Claimant cannot return to his former employment as a welder. Dr. C.

Murphy, Claimant's surgeon, gave Claimant permanent restrictions of no squatting, no kneeling and no climbing. Since I have found that Claimant's need for surgery was causally related to his workplace injury, Claimant has therefore established a prima facie case for total disability beginning on December 21, 2001, the day that he reached MMI. I must now examine whether Employer has shown that suitable alternative employment for Claimant exists.

Suitable Alternative Employment

Once a claimant has established a prima facie case for total disability, the employer may avoid paying total disability benefits by showing that suitable alternative employment exists that the injured employee can perform. The claimant does not have the burden of showing there is no suitable alternative employment available. Rather it is the duty of the employer to prove that suitable alternative employment exists. Shell v. Teledyne Movable Offshore, 14 BRBS 585 (1981); Smith v. Terminal Stevedores, 111 BRBS 635 (1979). The employer must prove the availability of actual identifiable, not theoretical, employment opportunities within the claimant's local community. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g 5 BRBS 418 (1977); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980). The specific job opportunities must be of such a nature that the injured employee could reasonably perform them given his age, education, work experience and physical restrictions. Edwards v. Director, OWCP, 999 F.2d 1374 (9th Cir. 1993), cert. denied, 511 U.S. 1031 (1994); Turner, 661 F.2d at 1041-1042. The employer need not place the claimant in suitable alternative employment. Trans-State Dredging v. Benefits Review Bd. (Tarner), 731 F.2d 199, 201, 16 BRBS 74, 75 (CRT) (4th Cir. 1984), rev'g 13 BRBS 53 (1980); Turner, 661 F.2d at 1043; 14 BRBS at 165. However, the employer may meet its burden by providing the suitable alternative employment. Hayes, 930 F.2d at 430.

If the employer has established suitable alternative employment, the employee can nevertheless prevail in his quest to establish total disability if he demonstrates that he tried diligently and was unable to secure employment. Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). The claimant must establish a reasonable diligence in attempting to secure some type of suitable employment within the compass of opportunities shown by the employer to be reasonably attainable and available and must establish a willingness to work. Turner, 661 F.2d at 1043.

Employers may rely on the testimony of vocational experts to establish the existence of suitable jobs. Turney v. Bethlehem Steel Corp., 17 BRBS 232, 236 (1985); Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985); Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231, 233 (1984); Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691 (1980); Pilkington v. Sun Shipbuilding & Dry Dock Co., 9 BRBS 473; 477-80

(1978). See also Armand v. American Marine Corp., 21 BRBS 305 (1988) (job must be realistically available). The counselors must identify specific available jobs; market surveys are not enough. Campbell v. Lykes Bros. Steamship Co., 15 BRBS 380, 384 (1983); Kimmel v. Sun Shipbuilding & Dry Dock Co., 14 BRBS 412 (1981). See also Williams v. Halter Marine Serv., 19 BRBS 248 (1987) (must be specific, not theoretical, jobs). The trier of fact should also determine the employee's physical and psychological restrictions based on the medical opinions of record and apply them to the specific available jobs identified by the vocational expert. Villasenor v. Marine Maintenance Indust., 17 BRBS 99, motion for recon. denied, 17 BRBS 160 (1985). To calculate a claimant's wage-earning capacity, the trier of fact may average the wages of suitable alternative positions identified. Avondale Indust. v. Director, OWCP, 137 F.3rd 326 (5th Cir. 1998).

In this case, Employer asked Ms. Moffett, a vocational rehabilitation counselor, to compile a list of jobs suitable for Claimant once he had reached MMI. Ms. Moffett included several jobs that were available as of December 3 and 7, 2001. She testified that she did not know whether those jobs were still available on December 20, 2001, the day Claimant reached MMI. Accordingly, I find that those jobs did not constitute suitable alternative employment.

Ms. Moffett also found some positions available to Claimant as of February 24 and 26, 2002. These jobs included a security officer position and two car wash positions. Ms. Moffett acknowledged that the car wash positions probably would not be appropriate for Claimant given his permanent restrictions, of which she was unaware at the time of the labor market survey. However, Ms. Moffett did believe that the unarmed security officer job would be suitable for Claimant. She testified that unarmed security officers do light duty work at a desk, checking identification and watching the monitors. While it is possible that a single job opening may be sufficient to show suitable alternative employment, there must be a reasonable likelihood that the claimant could obtain the job. See P&M Crane Co. v. Hayes, 930 F.2d 424, 24 BRBS 116, 121-22 (CRT) (5th Cir. 1991). This is a case-specific inquiry. See Diosdado v. John Bludworth Marine, Inc., 37 F.3d 629 (5th Cir. 1994). In this case, Claimant was not even aware of this job until several months later, when he met with Ms. Moffett in September 2002. Although Employer was not required to notify Claimant of the availability of the security officer job, the fact that it was the only identified job suitable for Claimant in February 2002, and Claimant was not even aware of it, makes it unlikely that Claimant could have obtained the job at that time. Thus, Employer failed to show suitable alternative employment in February 2002.

After Ms. Moffett met with Claimant, she identified several more job opportunities for him, including a bellman job, a position as a room monitor and a shuttle bus driver job. In her testimony, Ms. Moffett acknowledged that the bellman job would require Claimant to lift and move luggage and possibly to climb stairs. Although Claimant does not have a

permanent restriction regarding lifting, he is not supposed to squat, kneel or climb. Lifting and moving luggage is not an appropriate job for someone with Claimant's restrictions, especially not if there is a possibility that he may have to climb stairs. Thus, the bellman job does not constitute suitable alternative employment. Ms. Moffett also identified a room monitor job that she found on the internet. Ms. Moffett did not speak to the employer and did not know whether the job was actually available at the time she included it in her labor market survey. Due to the issue of availability, this job also does not constitute suitable alternative employment. In any case, Claimant never applied for either of these jobs.

The third job identified by Ms. Moffett was a shuttle bus driver position at a local casino. The driver takes passengers back and forth from the casino, and no lifting is involved. Ms. Moffett testified that this job did require a commercial driver's license, and she advised Claimant to obtain one. Claimant testified that he applied for this job, but it had already been filled. Since the job was not available when Claimant applied for it, the shuttle bus driver position was not suitable alternative employment at that point in time.

Ms. Moffett provided a supplemental job list dated November 11, 2002, which included a security officer position, a cashier job at the New Orleans airport parking garage, and the aforementioned bellman, room monitor and shuttle bus driver jobs, all of which were available beginning the week of November 6, 2002. Ms. Moffett found the cashier job in the newspaper and never contacted the employer to find out the physical requirements of the job or whether it was still available when she listed it. In addition, Claimant testified that he was never told about this job. Since there is no evidence regarding the requirements or actual availability of this job, the cashier job does not constitute suitable alternative employment. The security officer and shuttle bus driver positions, however, do constitute suitable alternative employment, as they are apparently readily available jobs which fall within Claimant's permanent restrictions. It appears from Claimant's testimony that he never completed the application process for the security officer job due to the fact that he was required to pay a fee and undergo a background check before being hired. While Claimant does have little income at this time, a $5-$10 fee is not a prohibitive cost given that this job fits within Claimant's permanent restrictions and is suitable alternative employment.

Claimant also testified that he applied for several jobs right before the hearing in this case, including some driving jobs that required a commercial driver's license. According to the Louisiana Office of Motor Vehicles website, a commercial driver's license costs $40 and is valid for four years. Despite Claimant's financial situation, $40 is not a prohibitive cost given that these jobs fit within Claimant's permanent restrictions and in fact are jobs that he would like to do. Both the shuttle bus driver job and the other driving jobs that Claimant has pursued constitute suitable alternative employment.

No evidence was offered post-hearing as to whether Claimant was able to obtain the jobs for which he applied in the weeks prior to the hearing. Other than the fact that he does not have a commercial driver's license, Claimant did not show that he would be unable to obtain either the shuttle bus driver job or the other driving jobs for which he applied. In addition, Claimant did not show that he would be unable to obtain the security officer job once he submitted to a background check. Employer thus established suitable alternative employment as of November 6, 2002, the date that Ms. Moffett determined the security officer and shuttle bus driver jobs were once again available. Accordingly, I find that Claimant's knee injury falls under the PEPCO doctrine and he is relegated to the schedule for compensation.

Choice of Physician

Section 7(c)(2) of the Act provides that when the employer or carrier learns of an employee's injury, either through written notice or as otherwise provided by the Act, it must authorize medical treatment by the employee's chosen physician. Once a claimant has made his initial free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier or deputy commissioner. See 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406.

The employer is ordinarily not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization. Slattery Assocs. v. Lloyd, 725 F.2d 780, 787, 16 BRBS 44, 53 (CRT) (D.C. Cir. 1984); Swain v. Bath Iron Works Corp., 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change can be excused, however, where the claimant has been effectively refused further medical treatment. Lloyd, 725 F.2d at 787, 16 BRBS at 53 (CRT); Swain, 14 BRBS at 664; Washington v. Cooper Stevedoring Co., 3 BRBS 474 (1976), aff'd, 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977); Buckhaults v. Shippers Stevedore Co., 2 BRBS 277 (1975).

Consent to change physicians shall be given when the employee's initial free choice was not of a specialist whose services are necessary for, and appropriate to, proper care and treatment. Consent may be given in other cases upon a showing of good cause for change. Slattery Assocs. v. Lloyd, 725 F.2d 780, 787, 16 BRBS 44, 53 (CRT) (D.C. Cir. 1984); Maguire v. Todd Pac. Shipyards Corp., 25 BRBS 299, 301-02; Swain v. Bath Iron Works Corp., 14 BRBS 657 (1982). The regulation only states that an employer *may* authorize a change for good cause; it is not required to authorize a change for this reason. Swain, 14 BRBS at 665. If a claimant's initially chosen physician provides him with the care of a specialist, the employer is no longer required to consent to a change in physicians to another specialist. Senegal v. Strachan Shipping Co., 21 BRBS 8 (1988).

Although Employer in this case has not specifically alleged a choice of physician issue, Employer has refused to pay the bills of Dr. George Murphy, who advised Claimant that surgery was his only option a short time after Dr. Katz released Claimant to full duty. There are several reasons why Employer should be responsible for Dr. Murphy's bills. First of all, Claimant went to see Dr. Murphy at the behest of Dr. Katz, who advised Claimant to get a second opinion on his injury after he and Claimant could not reach an agreement on the cause. Second, Dr. Katz released Claimant to full duty and told Claimant that no more treatment was necessary for Claimant's knee injury, despite the fact that Claimant had objective symptomatology that correlated with his subjective complaints of pain. Dr. Katz thereby effectively refused further medical treatment to Claimant by refusing to place Claimant on restrictions or to treat Claimant's injury simply because Dr. Katz believed it should have already resolved on its own. At that point, Claimant had little choice but to seek the advice of another orthopedic specialist who could better assist in his treatment. Consequently, I find that Claimant's failure to obtain authorization is excused due to the circumstances that led to his treatment with Dr. Murphy.

Medical Expenses

Section 7 of the LHWCA provides in pertinent part: "The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In order to assess medical expenses against an employer, the expenses must be reasonable and necessary. Pernell v. Capital Hill Masonry, 11 BRBS 582 (1979).

A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Dr. Murphy determined that due to the amount of time that had gone by after Claimant's accident, Claimant had no other option than surgery to repair a torn meniscus. Dr. Murphy further concluded that Claimant's need for surgery was causally related to his March 1999 workplace accident. Because the surgery was not only related to Claimant's workplace injury but also was necessary in order for him to return to work, I find that the surgery and all other related medical expenses, including the bills of both Drs. George and Charles Murphy, are reasonable and necessary medical expenses.

Conclusion

Based on the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following compensation order. All other issues not decided herein were rendered moot by the above findings.

ORDER

It is hereby ORDERED, ADJUDGED AND DECREED that:

1. Employer shall pay temporary total disability benefits to Claimant for the time period from August 10, 1999, through December 28, 1999, based on an average weekly wage of $532.85.

2. Employer shall pay temporary total and temporary partial disability benefits to Claimant for the time period from December 29, 1999, through August 22, 2001, in the stipulated amount of $19,881.98.

3. Employer shall pay temporary total disability benefits to Claimant for the time period from August 23, 2001, to December 20, 2001, based on an average weekly wage of $532.85.

4. Employer shall pay permanent total disability benefits to Claimant for the time period from December 21, 2001, the date of MMI, through November 6, 2002, the date Employer established suitable alternative employment, based on an average weekly wage of $532.85..

5. Employer shall pay Claimant permanent partial disability compensation for his scheduled right knee injury of seven percent in accordance with Sections 8(c)(2) and (19) of the Act, beginning November 6, 2002.

6. Employer shall pay all reasonable and necessary medical expenses, including Claimant's surgery and all other treatment rendered by Drs. George and Charles Murphy.

7. Employer shall receive a credit for benefits and wages paid.

8. Employer shall pay Claimant interest on any accrued unpaid compensation benefits at the rate provided by 28 U.S.C. § 1961.

9. Within thirty days of receipt of this Order, counsel for Claimant should submit a fully-documented fee application, a copy of which shall be sent to all opposing counsel who shall have twenty days to respond.

10. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

ORDERED this 20th day of March, 2003, at Metairie, Louisiana.

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LARRY W. PRICE
Administrative Law Judge

LWP:bab